

**Remarks of FCC Commissioner Michael O’Rielly
Before the R Street Institute and the Lincoln Network
November 28, 2017**

It is so great to be here, and I am thankful for the opportunity to express my views and strong support for the actions the Commission will take in a few short weeks. After the painful and demoralizing 2015 decision to insert government regulations into the middle of the greatest man-made invention of our time, I was never quite sure that this day would come.

Two years ago, the light of Internet freedom was nearly extinguished when the prior Commission majority mistakenly thought it was their duty to enact unnecessary and harmful edicts with the purpose of imposing their will over that of innovators, users, and Internet businesses, small and large. They thought that the election of the previous President sanctioned the enactment of elitist rule over the Internet. They thought the Internet would only succeed if they created a near omnipotent, unaccountable enforcement regime to troll Internet practices declaring winners and losers like a drunk 1920s NYC cop on the beat. They thought that paid prioritization practices, of which they demonstrated no understanding or knowledge, must be completely banned despite whatever benefits could possibly be delivered to consumers. They thought a few questionable instances from more than a decade prior could gloss over the fact that these were always prophylactic rules grasping about for a purpose and an imaginary boogeyman. They thought they could treat broadband providers like a public utility and all their mother-may-I style regulations would have no effect on investment or broadband buildout. And, they thought that no Commission would ever have the gumption to undo their prior bad deeds. But, they thought wrong.

We join today to signal the efforts of this new Commission, led by our able Chairman, to chart a different course for broadband and the Internet. It is one that looks a lot like that of the highly-successful, bipartisan governmental approach that existed prior to the imposition of the destructive Title II regime. And, it’s based on the free market principles that are the core of the American economy and our democracy. Under this Commission, we let facts prevail over hyperbole, and get the Internet regulatory structure back on the right course.

Internet Freedom is Being Restored Not Jeopardized

First and foremost, it’s important to dispel the notion that the FCC needs to “save net neutrality” else our freedom on the Internet will be put in jeopardy. That is pure hogwash. The Commission had no enforceable net neutrality rules prior to December 2010. That unregulated regime resulted in the creation of Google in 1998, Facebook in 2004, YouTube in 2005, and Twitter in 2006. Net neutrality supporters suggest we need rules to protect the “next Google” and “next Facebook.” But, no one can point to a single harm that prevented the 1.0 version of these companies. Indeed, the facts support the notion that the Internet flourished without *any* rules.

There is also no concrete evidence of network or consumer harm. Just recently I sat down with one prominent Internet legend and pioneer, who also happens to be a net neutrality supporter, and asked him why we needed rules and what supposed harms the agency needs to remedy. Here, I was mentally preparing for an intense dialogue full of technical intricacies that would test my understanding of network management and so forth. Instead, the response was non-substantive and sadly typical: he stated, once upon a time, a large cable company tried to break the Internet. The instance alluded to was not actually a violation, and that’s the best example that anyone has come up with in all this time.

Perhaps because of the lack of actual violations, supporters resort to dreaming up potential new violations that could supposedly occur absent government intervention. They argue that without these exact rules, broadband providers will block, throttle, or charge fees for individual users, small businesses, or start-ups who express certain views or try to compete against them. For these fears to materialize, you would have to assume that: 1) companies who have promised not to engage in such behavior, which are subject to enforceable action by the FTC, would do so anyway; and 2) consumers and advocates who scrutinize every action of these companies for the slightest missteps would somehow miss what was happening. This is complete lunacy. In an area like net neutrality, where the stakes are so high, the risk is far too great and any reward too paltry for a company to engage in such practices.

Net Neutrality's Mission Creep Must Be Halted

At the same time, we must not only halt the imposition of these net neutrality rules to broadband companies but also prevent its spread to the rest of the Internet ecosystem. It is incredible how far a bad idea can travel on the back of a foolish slogan.

In 2014, I warned that eventually FCC meddling and persistent mission creep meant “that the wrath of government regulations could be coming for edge providers next.”¹ At the time, I was criticized for sensationalizing the matter. Many policymakers and the edge community had convinced themselves there was some magical red line that would never be crossed.

Yet, just this year, we have seen the previously untouchable sector of the Internet economy come under criticism and their business practices subjected to oversight and scrutiny with demands that these companies also must be saddled with net neutrality. Indeed, one Senator just recently called for edge providers to be subject to net neutrality standards, stating that “Facebook, Google and Amazon, like ISPs, should be neutral in their treatment of the flow of lawful information and commerce on their platform.”²

And, similar calls for broader regulations will continue. Absent our action to cut off the octopus' tentacles, net neutrality will continue to stretch to every portion and crevasse of the Internet.

Preemption is Necessary to Avoid Market Disrupting Regulation

As we take this action, we must include a thorough preemption analysis, setting forth the technical facts and legal basis for our exclusive federal jurisdiction over broadband. By doing so, we establish a uniform, national framework that promotes investment and innovation.

It is critically important to be explicit that the service is interstate even though that may seem obvious. The draft order does just that. States and localities must be precluded from adopting a patchwork of regulations that would deter broadband investment by private businesses and undermine our own federal policies to facilitate deployment. Without this much-needed clarity, the FCC and businesses would end up wasting valuable time and resources playing defense in state legislatures, public utility commissions, and the courts to stamp out inconsistent laws and regulations.

Moreover, we have seen the damage that opportunistic state regulators can try to inflict when the FCC has refused to resolve questions of classification and jurisdiction. For more than a decade, the FCC

engaged in regulatory contortionism to keep from having to classify the offering of Internet applications, such as VoIP. During that time, certain states have tried to take advantage of the FCC's hesitation and regulate the service themselves, attempting to impose fees and institute approval processes.

We've also seen state legislatures attempt to impose privacy requirements on all Internet service providers (ISPs) after Congress rightly decided that the FCC's ill-advised rules should be rescinded. In California, for example, legislation was put forward last session that would not only have restored the FCC's rules but also would have barred voluntary arrangements where consumers obtain a discount from carriers for the use of their data.³ Now a ballot initiative picks up the place of the failed legislation and expands this broken thinking not just to ISPs but to all businesses that collect and sell data for commercial purposes.⁴

And California is not alone, as ten other states took steps this year to impose their own misguided privacy laws,⁵ creating uncertainty and placing providers of an offering that freely crosses state and local boundaries in the untenable and costly position of trying to comply with a mishmash of rules even within our own national borders. I certainly respect that our Constitution reserves certain powers to the states, but the regulation of interstate commerce is not one of them.⁶

Congress is Appropriate Venue for Any Net Neutrality Rules

While I do not believe that net neutrality rules are warranted – or that the FCC has any legal authority to enact such rules – ultimately that decision is not up to me, or my fellow Commissioners. This is a matter for our duly elected members of Congress, acting on behalf of the American people, to balance the competing ideas and interests and decide whether and to what extent rules are needed. In other words, the FCC should put things back the way they were and let Congress decide whether any further actions are justified.

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In closing, I will remind everyone that our job as Commissioners is – with fidelity to country – to follow the law and the accumulated record, and make the best decisions possible for the American people. However hotly-charged the debate may be or the number of comments filed in the record, we are asked to make the best decision, which may not always be the most popular. I am reminded of a quote by World War II General George Patton, who stated, “Do your duty as you see it, and damn the consequences.” In the coming weeks, I intend to do just that.

¹ Michael O’Rielly, *FCC’s Grab for New Regulatory Power Could Go Beyond Broadband Providers*, The Hill (May 6, 2014), <http://thehill.com/special-reports/technology-may-5-2014/205260-fccs-grab-for-new-regulatory-power-could-go-beyond>

² Ali Breland, *Franken Calls for Net Neutrality for Google, Twitter and Facebook*, The Hill (Nov. 8, 2017), <http://thehill.com/policy/technology/359499-franken-condemns-tech-calls-for-net-neutrality-for-google-twitter-and>.

³ Jazmine Ulloa, *Closely Watched California Internet Privacy Bill Dies in Final Minutes of Legislative Session*, Los Angeles Times (Sept. 16, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-internet-privacy-bill-1505542611-htmstory.html>.

⁴ Jazmine Ulloa, *Proposed California Ballot Initiative Would Give Consumers More Control Over Their Personal Information Online*, Los Angeles Times (Sept. 1, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-proposed-california-ballot-initiative-1504313223-htmstory.html>.

⁵ Eyrason Eidam, *10 States Take Internet Privacy Matters Into Their Own Hands*, Government Technology (Apr. 10, 2017), <http://www.govtech.com/policy/10-States-Take-Internet-Privacy-Matters-Into-Their-Own-Hands.html>.

⁶ Roslyn Layton, *The Federalist and Anti-Federalist Arguments for Internet Freedom*, AEIdeas (Nov. 15, 2017), http://www.aei.org/publication/the-federalist-and-anti-federalist-arguments-for-internet-freedom/?utm_source=newsletter&utm_medium=paramount&utm_campaign=cict.